SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 49 Original

STATE OF ILLINOIS, ex rel.
WILLIAM J. SCOTT, Attorney General of Illinois,

Plaintiff,

vs.

CITY OF MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF KENOSHA, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF RACINE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

CITY OF SOUTH MILWAUKEE, WISCONSIN, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, a municipality existing under the laws of the State of Wisconsin, and a political subdivision thereof, and

THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE, a municipality incorporated under the laws of the State of Wisconsin, and a political subdivision thereof,

Defendants.

BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THE BILL OF COMPLAINT

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ORIGINAL JURISDICTION

Plaintiff's motion for leave to file Bill of Complaint requests that the United States Supreme Court take original jurisdiction under Article III, Section 2, Clause 2, of the United States Constitution and, Title 28 U.S.C., Section 1251.

The City of Kenosha acknowledges the allegation that this court has jurisdiction to entertain plaintiff's proposed Bill of Complaint. It is respectfully submitted, however, that the allegations submitted in the proposed Bill of Complaint do not demonstrate either a pressing or imperative need for the exercise of jurisdiction by this court. The City of Kenosha is discharging its municipal obligations and governmental responsibilities in order to avoid and prevent pollution and contamination of Lake Michigan on a reasonable basis, giving consideration to practicability and the physical and economic feasibility of securing abatement of any pollution of waters which may be established as being attributable to the City of Kenosha.

Based upon the timetables established by both State and Federal agencies, the City of Kenosha, Wisconsin, is ahead of schedule in their efforts to eliminate pollution. To this end, the City of Kenosha has complete secondary treatment and chlorination on a daily basis. The City of Kenosha has also received Federal grants in order to conduct a demonstration project designed to treat excess storm water flows. Presently under project design is a program to remove phosphorus.

It is respectfully submitted that the court, in the past, has stated with reference to accepting original jurisdiction in certain cases: ". . . . . our original jurisdiction should be invoked sparingly . . . ." *Utah v. United States,* 394 U.S. 89, S. Ct. 761, 22 L. Ed. (2d) 99, 105, and,

". . . . when the necessity was absolute . . . .", *Louisiana v. Texas,* 176 U.S. 1, 20 S. Ct. 251, 44 L. Ed. 347.

REMEDIES AVAILABLE TO PLAINTIFF

In 1967, former Governor Kerner of the State of Illinois, in accordance with the provisions of Title 33, Sections 466 through 466 K., petitioned the proper Federal authorities, which resulted in a conference in the matter of pollution of Lake Michigan and its tributary basin waters in the State of Wisconsin, Illinois, Indiana and Michigan. It appears that sessions of such conference have been held in January of 1968, 1969 and 1970, and such sessions were held pursuant to the provisions of Section 10 of the Federal Water Pollution Control Act as amended.

As a result of the first conference, held in 1968, the State of Wisconsin signed a joint statement of agreement with all of the Lake Michigan basin states, which was directed at the development of a common policy for the protection of Lake Michigan from economic poisons.

Pursuant to the signing of such a joint statement, the State of Wisconsin established water quality standards, which were approved by the Secretary of Interior. In the State of Wisconsin, the Wisconsin Department of Natural Resources, existing under the provisions of Chapter 144 of the Wisconsin Statutes, and an agency of that State, is clothed with the administrative jurisdiction to deal with Wisconsin municipalities in matters pertaining to water pollution occurring in Lake Michigan and the Wisconsin Department of Natural Resources is also capable of cooperating with other States under the Federal Water Pollution Control Act.

In the interests of convenience, efficiency and justice, a program which has been in operation for more than

three years should not be disrupted and abandoned. Clearly, the administrative agencies which now exist and are in operation provide an adequate remedy for the State of Illinois to accomplish the goals which it allegedly is seeking and, it further appears that the administrative agencies which now exist can, and have been dealing effectively with the water pollution problems in Lake Michigan.

Plaintiff's brief sets forth cases wherein the Supreme Court previously has exercised its original jurisdiction in matters of this type. However, all of these cases involved air or water pollution complaints which arose prior to June 30, 1948, when Title 33, Sections 466 through 466 K. were originally enacted. Therefore, based upon the above cited approach, we respectfully submit that whatever may be the seriousness attached to the claimed circumstances of water pollution in Lake Michigan, as alleged by the State of Illinois, we respectfully submit that such circumstances can be adequately met administratively.

WHEREFORE the defendant, City of Kenosha, respectfully prays that the motion made by the plaintiff for relief to file a Bill of Complaint be denied.

Respectfully submitted,

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Defendants.

BRIEF OF THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

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BRIEF OF THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE

INTRODUCTION

This Brief is filed on behalf of the defendant, Metropolitan Sewerage Commission of the County of Milwaukee, in response to the motion of the plaintiff, State of Illinois, for leave to file its complaint. This defendant opposes the motion for leave to file the complaint on the following grounds:

1. This Court should refrain from accepting jurisdiction over the proposed action because an adequate remedy exists before an administrative agency of the federal government and procedures to protect the water quality of Lake Michigan are in progress before that agency.

2. Under the laws of the State of Wisconsin, the Metropolitan Sewerage Commission of the County of Milwaukee is not a municipal corporate entity in its own right, and, hence, is not a citizen of the State of Wisconsin for jurisdictional purposes.

Facts in addition to or in contradiction of those stated in the brief of the plaintiff shall be stated in the argument at the relevant points.

ARGUMENT

I. This Court Should Refrain From Accepting Original Jurisdiction Over the Proposed Action Because an Adequate Remedy Exists Before an Administrative Agency of the Federal Government and Procedures to Protect the Water Quality of Lake Michigan Are Now in Progress Before That Agency.

The Federal Water Quality Administration, formerly an agency of the Department of the Interior and now a division of the Environmental Protection Agency, has been empowered by Congress to investigate and correct pollution of interstate waters. This jurisdiction extends to both municipal and industrial sources of water pollution. The agency is empowered to issue administrative orders after notice and hearing requiring correction of causes of interstate pollution. These orders may be enforced by the Department of Justice of the United States in the Federal Courts. 33 U.S.C. 466, et seq., as amended.

In 1967, the Secretary of the Interior initiated the first step in the federal enforcement process by convening an enforcement conference pursuant to the legislation cited above to investigate and determine standards of water quality to be achieved and maintained for the waters of Lake Michigan and to determine what action was and is necessary to obtain the desired result. Numerous hearings and meetings have been held by this enforcement conference. Water quality standards have been determined, agreed upon and adopted by the participating states. All four states riparian to Lake Michigan (Wisconsin, Illinois, Indiana and Michigan) are participating in this conference. Corrective operating standards

for municipal sewage treatment and disposal have been determined by the conference and adopted and implemented by the participating states through the issuance of administrative orders by their water pollution control agencies, including compliance schedules.

The federal administrative procedures now in progress were invoked by the State of Illinois at the request of its then Governor, the Hon. Otto Kerner, in a letter dated November 22, 1967, addressed to the Secretary of the Interior. This request was based upon the allegation that pollution of Lake Michigan adversely affecting the health and safety of the citizens of the State of Illinois was originating from sources outside the borders of that state. The Secretary of the Interior made the prerequisite jurisdictional finding of fact that there was reasonable evidence to support this claim and proceeded to convene the Lake Michigan Enforcement Conference.

The State of Illinois bases its claim for relief in the proposed action on the grounds that the alleged pollution by the named defendants adversely affects the health and safety of the citizens of the State of Illinois. These are the same grounds used by the Secretary of the Interior for initiation of enforcement by the Federal Water Quality Administration under 33 U.S.C. 466, as amended. Such action has been initiated by this agency and has been carried to the point of requiring state pollution control agencies to issue corrective orders. This has been done. The Metropolitan Sewerage District of the County of Milwaukee is currently under orders issued by the Department of Natural Resources of the State of Wisconsin, pursuant to the standards adopted by the Lake Michigan Enforcement Conference. These orders contain deadlines for construction and operation

and necessary new facilities. Plans have been made, contracts let and construction is under way to accomplish compliance by the deadlines established.

Where Congress has provided statutory procedures designed to permit administrative agency expertise to be brought to bear on particular problems, those procedures ought to be exclusive. *Whitney National Bank v. Bank of New Orleans & Trust Co.,* 379 U.S. 411, 13 L. Ed. 2d 386, 85 S. Ct. 551.

Should the State of Illinois be of the opinion that it has been aggrieved by the actions of the administrative agency, an adequate procedure for judicial review of the agency's actions is available under the Federal Administrative Procedure Act, 7 U.S.C.A. 702 et seq., when review becomes timely.

Inasmuch as the State of Illinois initially selected the administrative agency as the forum for the resolution of this problem, it should be held to have made at least a temporary election of remedies and be barred from requesting duplicitous and simultaneous remedies for the same cause of action.

The cases cited by the State of Illinois, in support of its motion for leave to file the complaint in this suit, all substantially predate the federal legislation described previously. Only one of these cases dealt with interstate water pollution. *New Jersey v. New York City,* 283 U.S. 473, 51 S. Ct. 519, 75 L. Ed. 1176 (1931). One case dealt with interstate air pollution for which there is no current federal legislative remedy. *Georgia v. Tennessee Copper Co.,* 206 U.S. 230, 27 S. Ct. 618, 51 L. Ed. 1038 (1907). The other case cited is the first Chicago diversion case, which also involves a situation for which there is no current federal legislative remedy. *Wisconsin*

v. Illinois, 281 U.S. 179, 50 S. Ct. 266, 74 L. Ed. 799 (1930). We respectfully submit that these cases are no longer reliable authority for the exercise of original jurisdiction by this court in matters of interstate water pollution.

II. Under the Laws of the State of Wisconsin, the Metropolitan Sewerage Commission of the County of Milwaukee Is Not a Municipal Corporate Entity In Its Own Right, and, Hence, Is Not a Citizen of the State of Wisconsin for Jusrisdictional Purposes.

The pleadings state that this party is a municipality incorporated under the laws of the State of Wisconsin and is a political subdivision thereof. The Metropolitan Sewerage Commission of the County of Milwaukee does not have the status of a municipal corporation under the laws of the State of Wisconsin. The laws of the State of Wisconsin create a special purpose district, which is called the Metropolitan Sewerage District of the County of Milwaukee and is described as a "municipal body corporate." Section 59.96(5), *Wisconsin Statutes,* (1967). The two defendant Commissions, Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee, serve as the governing bodies of the District and each Commission is delegated certain powers to act individually for the District and certain other powers are exercised jointly. However, all powers are exercised by these Commissions as agents of the District and whatever they do is for the benefit of the Metropolitan Sewerage District of the County of Milwaukee. Section 59.96(5), *Wisconsin Statutes,* (1967). *S. D. Realty Co. v. Sew-*

erage Commission (1961), 15 Wis. 2d 15, 112 N.W. 2d 177. *Thielen v. Metropolitan Sewerage Commission* (1922), 178 Wis. 34, 189 N.W. 484.

The Sewerage Commission of the City of Milwaukee was originally created and its powers established by Chapter 608 of the Wisconsin Laws of 1913. However, its duties and responsibilities were substantially changed by the adoption of Chapter 554 of the Wisconsin Laws of 1921, now codified as Section 59.96, *Wisconsin Statutes*. Basically its functions are to construct, operate and maintain sanitary main sewers within the corporate limits of the City of Milwaukee and to plan, construct, operate and maintain sewage treatment plants on behalf of the District. The Metropolitan Sewerage Commission of the County of Milwaukee is created and its powers delegated by Section 59.96, *Wisconsin Statutes,* (1967). Basically its functions are to construct main sewers in the portion of the District outside the corporate limits of the City of Milwaukee and to improve watercourses as necessary to provide adequate surface water drainage. It does not treat sewage.

The Sewerage Commission of the City of Milwaukee does not have legal capacity to sue and be sued, except in conjunction with property acquisition on behalf of the District. The Metropolitan Sewerage Commission of the County of Milwaukee does have the capacity to sue or be sued in the name of or on behalf of the District. However, because of the limited nature of its functions, its own legal capacity has no relationship to the proposed action.

Neither of these commissions has the power to tax in its own right. The Commissions must act jointly to certify taxes on behalf of the District.

Both Commissions do have the power of eminent domain, must exercise it in the name of and on behalf of the District. Title to property taken is held in the name of the District. In *Thielen v. Metropolitan Sewerage Commission,* supra, the District was held to have the legal status of at least a *quasi*-municipal corporation generally analogous to a school district or drainage district in Wisconsin.

For purposes of determining federal jurisdiction, a local unit of government must have at least the status of a municipal body corporate in order to qualify as a citizen of the state in which it is located. 32 Am. Jur. 2d 532, *Federal Practice and Procedure,* Section 108. The Metropolitan Sewerage Commission of the County of Milwaukee does not have this status under the Laws of Wisconsin and, thus, is not a citizen of the State of Wisconsin for purposes of invoking the original jurisdiction of this Court under Article III, Section 2, Clause 2, of the Constitution of the United States and Title 28 U.S.C., Section 1251.

CONCLUSION

We respectfully submit that the motion for leave to file complaint by the State of Illinois alleging that the Metropolitan Sewerage Commission of the County of Milwaukee is polluting the interstate waters of Lake Michigan, in such a manner to adversely affect the health, safety and welfare of the citizens of the State of Illinois, should be denied on the grounds that an appropriate

remedy is available before the Federal Water Quality Administration and that this remedy has, in fact, been initiated by the State of Illinois and implemented by the State of Wisconsin through the Department of Natural Resources and that proceedings are pending before the Federal Water Quality Administration. Any further action in another forum should be barred under the doctrine of primary jurisdiction until such time as the administrative remedy that has been selected by the State of Illinons has been exhausted. There appears to be a serious question as to the status of this responding defendant, inasmuch as it is not in and of itself a "municipal body corporate" and, hence, is not a citizen of the State of Wisconsin for the purpose of conferring federal jurisdiction.

Respectfully submitted,

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